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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

CABAZON BAND OF MISSION INDIANS, et al.,
Petitioners,

v.

NATIONAL INDIAN GAMING COMMISSION, et al.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Following this Court's decision in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* Under that Act, Indian tribes are authorized to engage in gambling activities to raise governmental revenues under a scheme of tribal and federal regulation and oversight ("class II" gaming) which employs, specifically in connection with the statutorily catagorized class II game of "pull-tabs," the use of electronic, computer or other technologic aids." At the same time, the Act provides that certain forms of gaming, including that constituting "electronic or electromechanical facsimiles of any game of chance," be played only upon reaching an agreement with the state in which the reservation is located ("class III" gaming). Pull-tab games utilizing computer and video technology are perhaps the single-most important source for funding tribal governmental programs under the Act. The National Indian Gaming Commission has promulgated definitional regulations which recognize the class II statutory categorization of pull-tab games when played solely on a paper medium, but redefine the games as class III "electronic facsimiles" when played using video screens and computer technology. The placement of the games into class III will require their removal from petitioners' (and, throughout the country, numerous other tribes') reservations, causing severe disruption to governmental programs, unless and until the states in question otherwise approve. The questions presented are:

1. Whether pull-tab games employing video screens and computers constitute the use of "electronic, computer or other technologic aids" authorized by the Indian Gaming Regulatory Act's class II provisions, or are class III "electronic facsimiles" of games of chance which must be discontinued by the petitioner tribal governments absent state consent.

2. Whether the National Indian Gaming Commission erroneously interpreted the Indian Gaming Regulatory Act by determining that Congress intended "electronic facsimiles" to be synonomous with "gaming devices" under the Johnson Act, 15 U.S.C. § 1171(a)(2) and (3).

3. Whether the use in the Indian Gaming Regulatory Act of the phrases "electronic, computer or other techologic aids" and "electronic facsimiles" creates ambiguity which, under well-established canons of construction unique to Indian law, must be resolved in favor of petitioner Indian tribes.

LIST OF PARTIES

Petitioners:

Cabazon Band of Mission Indians
Eastern Band of Cherokee Indians
Poarch Band of Creek Indians
Pueblo of Isleta
Rumsey Rancheria
San Manuel Band of Mission Indians
Spokane Tribe
Delaware Tribe of Western Oklahoma

Respondents:

National Indian Gaming Commission
Anthony J. Hope, Chairman
United States Department of the Interior
Bruce Babbitt, Secretary
United States Department of Justice
Janet Reno, Attorney General

Respondent
Intervenors:

The States of:

Alabama
Arizona
California
Colorado
Connecticut
Florida
Idaho
Kansas
Michigan
Mississippi
Nebraska
North Dakota
South Dakota
Wisconsin
Wyoming

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioners in this matter are eight federally recognized Indian tribes (collectively referred to as the "Tribes"). The Tribes respectfully petition for a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered on January 28, 1994.

OPINIONS BELOW

The opinion and judgment of the District of Columbia Circuit, which is reported at 14 F.3d 633, is reprinted in the Appendix at pages A1 to A10. The judgement and memorandum opinion of the U. S. District Court for the District of Columbia, entered on June 28, 1993, and reported at 827 F.Supp. 26, is reprinted in the Appendix at pages B1 to B22.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed here was entered on January 28, 1994. On March 28, 1994, the Court of Appeals entered two orders denying the Tribes' Petition for Rehearing and Suggestion for Rehearing In Banc. Those orders are reprinted in the Appendix at pages C1 and C2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THE CASE

The Indian Gaming Regulatory Act is codified at 25 U.S.C. § 2701 *et seq.* Two specific statutory provisions are relevant to this proceeding. The first is the congressional declaration of policy which underlies the Act. That section provides:

§ 2702. Congressional declaration of policy

The purpose of this chapter is—

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian

Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702.

Also relevant is the statutory definition of "class II gaming," found at 25 U.S.C. § 2703(7)(A) and (B). That section provides, in pertinent part:

(7)(A) The term "class II gaming" means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

* * *

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, . . .

* * *

(B) The term "class II gaming" does not include—

* * *

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

The two regulations promulgated by the respondent National Indian Gaming Commission (the "Commission"), the validity of which are challenged by the Tribes in this case, were initially published at 57 Fed. Reg. 12382, 12392-93 (April 9, 1992) and are codified at 25 C.F.R. §§ 502.7 and 502.8. Those definitions are as follows:

§ 502.7 Electronic, computer or other technologic aid.

Electronic, computer or other technologic aid means a device such as a computer, telephone, cable, television satellite or bingo blower and that when used—

(a) Is not a game of chance but merely assists a player or the playing of a game;

(b) Is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and

(c) Is operated according to applicable Federal communications law.

§ 502.8 Electronic or electromechanical facsimile.

Electronic or electromechanical facsimile means any gambling device as defined in 15 U.S.C. 1171(a)(2) or (3).

Finally, the statutory definition of "gambling device" under the Johnson Act, 15 U.S.C. § 1171(a)(2) and (3), is also relevant here in that the Commission's definition of "electronic or electromechanical facsimile" incorporates a portion of that definition by reference. The incorporated provisions of the Johnson Act are as follows:

1171. Definitions

As used in this chapter—

(a) The term "gambling device" means—

* * *

(2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device,

but which is not attached to any such machine or mechanical device as a constituent part.

STATEMENT OF THE CASE

I. Nature of the Controversy

Petitioners are eight Indian tribes that conduct gaming on their reservations using video and computer assisted pull-tab games. 827 F.Supp. at 28, Appendix at B6. Both the District Court and the Court of Appeals have included a description of the pull-tab games in their opinions. *See* 827 F.Supp at 28, n.2, Appendix at page B5-6, n.2; 14 F.3d at 635, Appendix at page A5. In summary, the game involves players selecting chances from a finite number of such chances (a "deal"), which includes a predetermined number of winners and losers. If the pull-tab selected by the player contains a preannounced combination of symbols, the player wins. Once a pull-tab is played, it is removed from that deal, thus affecting the players' chances of winning or losing on each subsequent play. The game of pull-tabs may be played on either printed or video media.

The Tribes rely on the revenues derived from these gaming activities to fund a broad range of tribal programs and services, including fire protection, law enforcement, child care, housing, education and health care services on their reservations. Detailed information concerning the extent to which the Tribes rely on these gaming revenues and the uses to which they are put are set forth in the Affidavit of Eddie L. Tullis, reprinted in the Appendix at pages D1 to D7; the Declaration of Mark Nichols, reprinted in the Appendix at pages E1 to E3; the Affidavit of Lowanda Abraham, reprinted in the Appendix at pages F1 to F2; and the Declaration of Marshall McKay, reprinted in the Appendix at pages G1 to G2.

Gaming on Indian reservations is governed by the Indian Gaming Regulatory Act ("IGRA" or the "Act"). IGRA establishes three classes of gaming, each subject to a different regulatory structure. "Class I" gaming consists of traditional forms of tribal gaming usually associated with ceremonial or social events, 25 U.S.C. § 2703(b), and is not at issue in this case. "Class II" gaming consists of games generically referred to as "bingo," a term which consists of traditional bingo (players matching symbols and patterns against symbols and patterns which are randomly generated), and certain other specified games (the "subgames") if played at a location where traditional bingo is played. The class II subgames include "pull-tabs, lotto, punch boards, tip jars, instant bingo and other games similar to bingo. . . ." 25 U.S.C. § 2703 (7)(A)(i).

In addition, the Act expressly authorizes the use of "electronic, computer or other technologic aids" in connection with the playing of bingo and the subgames. *Id.*[1]

"Class III" gaming consists of all gaming not within classes I or II. 25 U.S.C. § 2703(8). Included within class III by express exclusion from class II are "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B)(ii).

Under IGRA, Indian tribes may operate class II games under tribal regulation with oversight by the National Indian Gaming Commission, but need not obtain the consent of the state in which the reservation is located. Class III games, however, may be operated only pursuant to a "compact" which has been reached between the tribe and the relevant state government. 25 U.S.C. § 2710(d)(1)(C).[2]

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[1] Class II also includes certain card games, 25 U.S.C. § 2703 (7)(A)(ii), which are not at issue in this case.

[2] Despite the IGRA's clear mandate that the states negotiate in good faith with the tribes to achieve compacts, 25 U.S.C. § 2710(d), the

During the early 1990's, a number of Indian tribes, including the petitioner Tribes, accepted the invitation of Congress to adopt advancing technology to their class II gaming operations and installed video and computer enhanced pull-tab games in their tribal gaming facilities. *See* Affidavit of Eddie L. Tullis, ¶ 4, Appendix at page D2; Declaration of Mark Nichols, ¶ 3, Appendix at page E1; Declaration of Marshall McKay, ¶ 4, Appendix at pages G1 to G2. These games proved to be extremely popular with the Tribes' customers, and the revenues from the video pull-tab games quickly became a major source of the Tribes' total gaming revenues. *See* Tullis Affidavit, ¶ 15, Appendix at page D5 to D6; Nichols Declaration, ¶ 4, Appendix at page E1; Abraham Affidavit, ¶ 3, Appendix at page F1.

In April, 1992, three and one-half years after IGRA was enacted and a year after the Tribes had begun operating video pull-tab games, the National Indian Gaming Commission published its definitional regulations. Those regulations narrowly defined "electronic, computer or other technologic aids" while broadly defining "electronic facsimile" as being synonymous with "gambling devices" under the Johnson Act. These definitions characterized the video pull-tab games as class III gaming activities.

At issue in this case, then, is whether computers, video monitors and other technology used by petitioner Indian tribes in connection with pull-tab games at their reservation gaming facilities are "electronic, computer or other technologic aids" to class II gaming, which are expressly permitted under Section 2303(7)(A)(i) of the Act, or constitute class III "electronic facsimiles of a game of chance" under the disputed regulations, as the Court of Appeals has held.

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process does not always work in practice. Of the eight petitioner Tribes in this case, six are currently involved in other lawsuits challenging the states' failure or refusal to negotiate compacts.

II.

Proceedings Below

This action was filed in May, 1992. The complaint, which sought declaratory and injunctive relief, challenged the validity of a number of definitional regulations promulgated by the National Indian Gaming Commission. The jurisdiction of the District Court was based upon 28 U.S.C. §§ 1331 (federal question) and 1362 (Indian tribe — federal question) and the Administrative Procedure Act, 5 U.S.C. § 702. The defendants were the Commission, its chairman and other federal departments and officials with jurisdiction over tribal gaming activities. Shortly after the case was filed, fifteen states intervened as defendants.

On cross-motions for summary judgment, the District Court found there were no genuine issues of material fact and that the case was appropriate for summary disposition. By memorandum opinion dated June 28, 1993, the District Court denied the tribes' motions and granted the federal defendants' and intervenor states' motions, upholding the validity of the regulatory definitions. The court determined among other things that the computer and video technology at issue placed the pull-tab games within class III as "electronic facsimiles."[3]

On July 8, 1993, the Tribes filed a motion in the District Court seeking an injunction pending appeal. The District Court denied that motion on July 19, 1993. On August 24, 1993, the Tribes renewed that motion before the Court of Appeals, which granted it on September 23, 1993. Under that order, the defendants were "enjoined from interfering

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[3]The District Court also dismissed a counterclaim filed by the petitioner Poarch Band of Creek Indians against the intervenor State of Alabama, Appendix at pages B18 to B22. That dismissal was not appealed to the D. C. Circuit and is irrelevant to the issues presented in this Petition.

with the [Tribes'] continued use and operation of the games at issue in this case pending resolution of the appeal . . . ." A copy of the Court of Appeals' order granting the injunction is reprinted in the Appendix at page H-1.

On appeal, the Tribes limited the focus of their challenge solely to the status of the computer assisted pull-tab games. After briefing and argument, the Court of Appeals entered its opinion and judgment on January 28, 1994. The Circuit Court affirmed the decision of the District Court, finding that the video pull-tab games operated by the Tribes had been properly characterized by the Commission as class III "electronic facsimiles." The Court of Appeals found the distinction between an "electronic, computer or other technologic aid" and an "electronic facsimile" to be apparent on the face of the statute.

By orders dated March 28, 1994, the Circuit Court denied the Tribes' Petition for Rehearing and Suggestion for Rehearing In Banc. On the same date, however, the Court of Appeals granted the Tribes' motion to stay the issuance of the mandate for 30 days, pursuant to Fed. R. App. P. 41(b). This Petition followed.

REASONS FOR GRANTING THE PETITION

I.

The Issues Presented In This Case Are of Critical Importance To Indian Tribes Throughout The Country.

In practical terms, this may be the most significant Indian law case the Court has considered since *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In that case, this Court affirmed the right of Indian tribes to engage in gaming activities on their reservations as a means of generating desperately needed tribal revenues and providing employment opportunities for tribal members. Congress responded a year later by enacting the Indian Gaming

Regulatory Act ("IGRA"), which codified the basic holding of *Cabazon* and established a three-tiered regulatory structure for such activities. *See generally Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1030 (2d Cir. 1990), *cert. denied* ___ U.S. ___, 111 S.Ct. 1620 (1991); *United States v. Sisseton Wahpeton Sioux Tribe*, 897 F.2d 358, 359-60, 366 (8th Cir. 1990).

As a result, in recent years many Indian tribes throughout the country have developed successful gaming enterprises on their reservations. According to a recent report by the Inspector General of the Department of the Interior, 171 tribes are currently operating 257 reservation-based gaming establishments. U. S. Department of the Interior, Office of Inspector General, "Survey Report: Implementation of the Indian Gaming Regulatory Act," Report No. 93-I-349, December 1992, at 16. This report also found that:

> With the revenues received from gaming operations, some tribes have been able to build schools, hospitals, sewer and water systems, and other community facilities. Gaming revenues have also provided capital for financing new tribal industries. Further, gaming has provided employment for many Native Americans who live in economically depressed areas and overall has increased self-sufficiency on many Indian reservations.

Id. at 1.

While many tribes have made a commendable start in improving conditions on their reservations through gaming activities, the decision in this case jeopardizes the economic viability of these tribal efforts. The erroneous interpretation of certain provisions of IGRA adopted by the National Indian Gaming Commission and incorporated into the challenged regulations would have the effect of destroying many of these now-successful tribal enterprises. The regulations would also impermissibly prevent the tribes from competing

effectively with state lotteries and private gaming interests, which are not restricted from adopting emerging technological advancements to their gaming activities.

The adverse economic, social and governmental impacts on Indian tribes that would flow from these unlawful regulations are immense. Among the petitioner Tribes, the effects would be devastating. On the small Cabazon Reservation in southern California, gaming revenues account for 94% of the total tribal budget, and fully 75% of those gaming revenues are directly derived from the operation of video pull-tab games. Nichols Declaration, ¶ 4, Appendix at page E1. These revenues, in turn, are used to finance necessary tribal services including fire protection services, a child care center, scholarship programs and substance abuse programs. *Id.*, ¶ 5. Similarly, the Poarch Band of Creek Indians of Alabama derives 80% of its operating revenues from the pull-tab games, which fund tribal health, law enforcement and housing programs, among others. Tullis Affidavit, ¶¶ 6, 15 Appendix at pages D2 and D5. The Delaware Tribe of Oklahoma obtains approximately 42% of its gaming revenue from video pull-tab games, and likewise uses those funds to provide health, education and emergency assistance to its members. Abraham Affidavit, ¶¶ 3, 5, Appendix at page F1 and F2.

The record is also clear that the petitioner Tribes will suffer irreparable harm if they are required to discontinue the use of the technologically enhanced pull-tab games at issue in this case. The Tribes have no alternative sources of revenue to fund these vital reservation programs and services. Without the revenues derived from the video pull-tab games, the Tribes and their members will be left without critical law enforcement, fire protection, health, education and housing programs. *See* Nichols Declaration, ¶ 5, Appendix at pages E1 to E2; Abraham Affidavit, ¶ 5, Appendix at

page F2; Tullis Affidavit, ¶ 16, Appendix at page D6; McKay Declaration, ¶ 6, Appendix at page G2.

Moreover, hundreds of tribal jobs will be lost on the reservations of the petitioner Tribes, sending now-productive tribal members back to the public assistance rolls. *See* Nichols Declaration, ¶ 6, Appendix at page E2 (approximately 150 jobs would be lost); Tullis Affidavit, ¶ 6 Appendix at page D2 to D3 (tribal gaming facility employs 132 persons); Abraham Affidavit, ¶ 4, Appendix at page F1 to F2. Plainly, these impacts on the Tribes and their members would be substantial and irreparable.

In addition, it is important to note that the challenged regulations would have similar consequences on dozens of other Indian reservations throughout the United States where computer-enhanced pull-tab games are in operation. The administrative record of the proceedings by which the Commission adopted the disputed regulations contains testimony and statements from dozens of tribal officials and representatives. *Every single tribal spokesperson* testified against the regulations which were later adopted by the Commission. This tribal testimony is replete with concerns about the harmful effects on tribal economies and tribal governments that would result from erroneously classifying video assisted pull-tab games as class III gaming. Those tribes, like the petitioners here and many additional tribes in other parts of the country, will be severely impacted if the Court does not grant this petition and overturn the challenged regulations.

The national significance of the issues presented in this case are set forth with unmistakable clarity in the decision of the federal mediator in *Yavapai—Prescott Indian Tribe v. State of Arizona*, No. M-93 00001 PHX (D. Arizona, February 15, 1993) *reprinted* at 20 Indian Law Reporter 3081 (April, 1993). In that case, following the procedures set forth in IGRA, the District Court appointed a mediator

to select between the gaming compacts proposed by the tribes and the state.[4] The mediator, who was the retired Chief Justice of the Arizona Supreme Court, conducted extensive hearings and visits to the reservations before selecting the tribal compacts. In explaining that decision, Justice Gordon related IGRA to the realities of reservation life in the following terms:

> It is obvious that this Act was intended to give America's Indian tribes a source of revenue not previously available to them to somehow compensate for the generations of neglect that both state and federal governments have allowed to occur to reservation Indians. It seems to me that those who drafted the Act's Declaration of Policy [reprinted above at pages 2-3] must have had in mind the difficult situation in which many Indian tribes find themselves today .... For whatever reasons, neither the state nor the federal government has furnished adequate revenue to provide for the needs of these tribes in areas of health, education, economic development, or governmental infrastructure. Also, the tribes, though varying in degree between them, lack tax bases and natural resources to generate returns sufficient to provide those necessities. Each of the tribes involved has unemployment rates several times that of Arizona as a whole. Indians on these reservations have exceptionally high rates of alcoholism, drug abuse, school dropouts, teen suicides and pregnancies and adult suicides. The rate of functional illiteracy among tribal members in each of the tribes involved greatly exceeds the rate in the rest of Arizona. In all three tribes, depression and feelings of hopelessness prevail. Their leaders see no light at the end of the funnel: no hope that things will change and get better.

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[4]Those procedures are set forth in the Act at 25 U.S.C. § 2710(d)(7)(B)(iv).

> None of the tribes would favor gambling as its primary resource if other sources of revenue were available. Yet the tribes see the opportunities under the Indian Gaming Regulation Act as being the only ones left to them which will provide a "jump start," to give them the money; to provide a higher level of quality education to their young and old so they can compete in the Anglo economic world; to preserve their cultures; and to fulfil the most basic needs of housing and health care to their people.
>
> Although I have resided in Arizona all but six months of my life, and have seen living conditions on several Indian reservations in Arizona, I was shocked to see the substandard housing, medical and educational conditions that existed on the Tohono O'Odham reservation. The elderly, sick and disabled on that reservation live in conditions not unlike many third world countries in Africa today. To a lesser degree, many of the conditions I observed on the Tohono O'Odham reservation exist on the other two reservations.

20 Indian Law Reporter at 3081-82.

In *Cabazon*, this Court recognized the compelling need and the inherent right of Indian tribes, including petitioner Cabazon Band, to become economically self-sufficient through gaming activities. As the Court correctly noted there:

> Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members.

480 U.S. at 219. Precisely the same considerations underlie this petition. Literally hundreds of millions of dollars in tribal revenues are at stake here, as well as thousands of tribal jobs; all of which are jeopardized by the Commission's unlawful regulations.

II.

The Decision of the Court of Appeals Is Erroneous

In affirming the District Court and upholding the validity of the disputed regulations, the Court of Appeals made two errors that require this Court's review.

A. The Court of Appeals Equated "Facsimile" With "Version," Thereby Misconstruing Congressional Intent.

As the Court of Appeals noted, it has been undisputed throughout the course of this case that the fundamental characteristics of the pull-tab game remain the same whether the game is played with paper cards or video screens. Appendix at pages A7. Yet, the court below used this fact to erroneously conclude that the video version of the pull-tab game was an "electronic facsimile" of the game played on paper cards:

> As commonly understood, facsimiles are exact copies, or duplicates. Although there may be room for a broader interpretation of 'facsimile,' the video version of pull-tabs falls within the core meaning of electronic facsimile. It exactly replicates the paper version of the game and if that is not sufficient to make it a facsimile, we doubt, as did Judge Lamberth (827 F.Supp. 32), that anything could qualify.

Appendix at pages A7 to A8.

The flaw in this reasoning is that the video version of pull-tabs is not a "copy," "duplicate" or "replication" of anything. Instead, the Court of Appeals is confusing "facsimile" with "version," which has a vastly different meaning. Admittedly, the game at issue is an electronic version of the game of pull-tabs. The point, however, is that IGRA nowhere specifies which "version" of the game is authentic, and which would therefore be the "facsimile." It is no more

correct to say that the electronic version of the game is a facsimile of the paper version than to claim that the latter is a facsimile of the electronic version. Both are the same pull-tab game described under class II of the Act. The former version simply employs the use of electronic, computer and other technologic aids in the playing of the class II game. It replicates nothing.

This distinction is consistent with the Court of Appeal's logic, if not its conclusion. While the Circuit Court chided petitioners for supposedly "wrenching" the meaning of "facsimile" into meaning something which is "different," when its definition means an exact copy, Appendix at page A8, we submit that a copy is itself, by definition, something other than that from which it was copied. There can be two or more authentic versions of something, but a copy or facsimile would never be considered authentic. For example, an artist painting a seascape might paint one version with oils and another version in watercolors. Although each employed different media, both would be authentic works of that artist. But were one to say they had a "facsimile" or "copy" of either of those versions, it would be understood immediately that they did not possess an authentic, or original, work of art. A facsimile of a Picasso is not a Picasso. As Judge Lamberth correctly stated, albeit for an opposite purpose and with apologies to Gertrude Stein, "a facsimile is a facsimile is a facsimile." Appendix at page B16. By a parity of reasoning and paraphrasing, "authentic is authentic is authentic." Petitioners are using an authentic pull-tab game, not a facsimile.

This analysis is based on the premise that for class II gaming regulatory purposes, the game is defined by its rules, not its media, and that so long as the rules of a class II pull-tab game are preserved, it *expressly* remains within that class despite the use of an "electronic, computer or other technologic aid." 25 U.S.C. § 2703(7)(A). For example, in

describing "bingo" within the same general section (the only game actually defined in the Act), the statute provides:

> (i) The game of chance commonly known as bingo *(whether or not electronic, computer, or other technologic aids are used in connection therewith)*—
>
> I. Which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
>
> II. In which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, or drawn *or electronically determined,* and
>
> III. In which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards . . . ."

25 U.S.C. § 2703(7)(A) (emphasis added). It is the rules of the game that are emphasized here, not the medium on which the game is played; prizes are awarded to the first person covering a predesignated arrangement of numbers on cards.

The use of electronics has become prevalent in playing bingo, just as Congress anticipated. "Cards" are often not paper cards, but electronic devices which keep track of the numbers and arrangements, enabling players to play as many as 256 games at a time. Tullis Affidavit, ¶ 7, Appendix at page D-3. These are sanctioned by the National Indian Gaming Commission as class II "electronic aids," 57 Fed.Reg. at 12386-7 (April 9, 1992), as are television monitors and computers that do the same thing. 25 CFR § 502.7. The Act itself expressly authorizes a version of bingo in which the numbers are "electronically determined." 25 U.S.C. § 2703(7)(A)(i)(II). When video "cards," electronic number selection and the like are thus combined, what is created is an electronic version of bingo. Neverthe-

less, it is still *class II* bingo, not a class III "facsimile" of that game, because the essence of the class II activity, i.e., its fundamental rules, has been preserved.

So too with the electronic pull-tab game: each of the rules of the class II pull-tab game has been carefully preserved. The activity aided by electronics is not a "copy" (i.e., a reproduction or imitation, Webster's Third New International Dictionary 574 (1971)) or "facsimile". It is as much the real thing as is the game played with paper.

Equally as important, under the D. C. Circuit's interpretation the term "facsimile" has no substantive meaning. This, of course, conflicts with the teaching of this Court that in matters of statutory construction, the reviewing court must give meaning to every word and provision of the statute. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). If an electronic "version" of a game of chance is all that was intended by Congress, then the statute could have just as easily read that "electronic or electromechanical [...] games of chance" are omitted from class II. Under the lower court's reasoning that "facsimile" is equivalent to "version," all electronic games, including the bingo game described above, would be placed within class III. Yet that is clearly not what Congress intended, or it would not have gone out of its way to provide for "electronic, computer or other technologic aid(s)" for class II activities like the playing of bingo and the pull-tab game. Nor would the Senate Report accompanying IGRA have bothered to state that

> "the [Indian Affairs] Committee specifically rejects any inference that tribes should restrict class II games to existing games sizes, levels of participation, *or current technology*. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the *language*

regarding technology is designed to provide maximum flexibility.

Senate Report No. 100-446, 100th Cong. 2d Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News, 3071, 3079 (emphasis added). Simply put, the mere fact that a game is in an electronic form does not render that game a "facsimile" of a game of chance, and the Court of Appeals erred in so holding.

B. At The Very Least, The Court of Appeals Erred In Failing To Find Any Ambiguity In The Distinction Between "Electronic Aids" and "Electronic Facsimiles" Under The Act.

The court below found no ambiguity whatsoever in determining congressional intent as to the distinction between class II "electronic aids" and class III "electronic facsimiles." The Court of Appeals found the distinction to be clear from the face of the statute. Appendix at page A10. As a result, the court below found no need to apply the well-established canon of construction that applies specifically to federal enactments affecting Indian tribes.

That canon provides that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985). This is an "eminently sound and vital canon" that must be followed by federal courts. *Bryan v. Itasca County,* 426 U.S. 373, 392 (1976). Accordingly, the rule supplants the ordinary one allowing an agency considerable leeway in interpreting ambiguous statues. "The result, then, is that if the [statue] can reasonably be construed as the Tribe would have it construed, it *must* be construed that way." *Muscogee (Creek) Nation v. Hodel,* 851 F.2d 1439, 1445 (D.C. Cir. 1988) (emphasis in original), *cert. denied,* 488 U.S. 1010 (1989).

While the rule requiring construction in favor of the tribes would apply regardless of its acknowledgement by Congress in the Act's legislative history, Congress did in fact articulate its expectation that the rule would be applied to IGRA:

> Mr. Speaker, while this legislation does impose new restrictions on tribes and their members, it is legislation enacted basically for their benefit. I would expect that the Federal courts, in any litigation arising out [of] this legislation, would apply the Supreme Court's time-honoring rule of construction that any ambiguities in legislation enacted for the benefit of Indians will be construed in their favor.

134 Cong. Rec. H8153 (daily ed., Sept. 26, 1988) (statement of House Interior Committee Chairman Udall); *see also* Senate Report, 1988 U.S. Code Cong. & Admin. News at 3085 (accord).

It is significant that the absolute clarity that the Court of Appeals found in the language of IGRA has escaped many other knowledgeable observers. Although the lower court found the distinction between class II "aids" and class III "facsimiles" to be crystal clear from the statutory language itself, a number of other federal and state officials have read the same language and reached conclusions that differ dramatically. Among these are the following:

*The Eastern Area Director of the federal Bureau of Indian Affairs issued a written opinion on January 11, 1991, that the video pull-tab games at issue in this case were class II gaming. He found "no rationale for distinguishing electronic pull-tabs from manual pull-tabs. This machine is not a copy but the actual game itself played through the circuitry of advanced technology." This opinion was later withdrawn for procedural rather than substantive reasons.

*The then-Attorney General of Alabama concluded in a January 11, 1991, opinion that the same video pull-tab

games "are electronically assisted bingo and do constitute class II gaming under IGRA." The next Attorney General of Alabama subsequently repudiated this opinion of his predecessor.

*The Attorney General of California issued a directive to local law enforcement agencies within that state on October 8, 1991, that "the only machines which are permitted as class II devices under IGRA are machines that are actual facsimiles of the game of bingo."

In addition to these examples, the ambiguous nature of the statutory scheme is clearly evidenced by the very administrative record compiled by the Commission while finalizing its definitional regulations. That 1500-page record contains hundreds of pages of testimony and statements from dozens of witnesses who vigorously disagreed with the definitions ultimately promulgated by the Commission and upheld by the lower courts. At the very least, this wide divergence of views as to the proper distinction to be drawn between class II "technologic aids" and class III "electronic facsimiles" demonstrates that there is some measure of ambiguity with respect to the proper interpretation of these terms.

If this is so, then the lower court erred in failing to employ the special canon of construction that such ambiguities should be resolved in a manner that is favorable to the tribes.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

DATED this 26th day of April, 1994.

Respectfully submitted,

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Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 14, 1993 Decided January 28, 1994

No. 93-5255

CABAZON BAND OF MISSION INDIANS; EASTERN BAND OF CHEROKEE INDIANS; POARCH BAND OF CREEK INDIANS; PUEBLO OF ISLETA; RUMSEY RANCHERIA; SAN MANUEL BAND OF MISSION INDIANS; SPOKANE TRIBE; DELAWARE TRIBE OF WESTERN OKLAHOMA,
APPELLANTS

v.

NATIONAL INDIAN GAMING COMMISSION, AN AGENCY OF THE UNITED STATES; ANTHONY J. HOPE, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE NATIONAL INDIAN GAMING COMMISSION; UNITED STATES DEPARTMENT OF THE INTERIOR; BRUCE BABBITT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF THE INTERIOR; DEPARTMENT OF JUSTICE; JANET RENO, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,
APPELLEES

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appendix A-2

STATES OF ALABAMA, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, IDAHO, KANSAS, MICHIGAN, MISSISSIPPI, NEBRASKA, NORTH DAKOTA, SOUTH DAKOTA, WISCONSIN, AND WYOMING, INTERVENORS

Appeal from the United States District Court for the District of Columbia

(92cv1103)

Jerome L. Levine, of the Supreme Court of California, *pro hac vice*, by special leave of court, and *Glenn M. Feldman* argued the cause for appellants. With them on the briefs were *Ben Bridgers*, *Howard Dickstein*, *William R. Perry*, *Jerry C. Straus*, *Lamar Parrish* and *William J. O'Brien, II*. *Philip L. O'Neill* entered an appearance for appellants Cabazon Band of Mission Indians, Eastern Band of Cherokee Indians, Poarch Band of Creek Indians, Pueblo of Isleta, Rumsey Rancheria, San Manuel Band of Mission Indians, Spokane Tribe, and Delaware Tribe of Western Oklahoma. *Hans Walker, Jr.* entered an appearance for appellant Delaware Tribe of Western Oklahoma.

Mark R. Haag, Attorney, United States Department of Justice, argued the cause for appellees. With him on the brief were *Lois Jane Schiffer*, Acting Assistant Attorney General, United States Department of Justice, and *Edward J. Shawaker*, Attorney, United States Department of Justice.

Jonathan A. Glogau, Assistant Attorney General, Office of the Attorney General of the State of Florida, argued the cause and filed the brief for intervenors. *Carol Jean Smith* and *Ronald C. Forehand*, Assistant Attorneys General, Office of the Attorney General of the State of Alabama, entered an appearance for intervenor State of Alabama.

Before: WALD, GINSBURG, and RANDOLPH, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge:* This is an appeal from the order of the district court, Lamberth, J., granting summary judgment in favor of the defendants National Indian Gaming Commission and its Chairman, the Department of the Interior and its Secretary, and the Department of Justice and the Attorney General; and in favor of the fifteen States listed in the caption as intervenors. *Cabazon Band of Mission Indians v. National Indian Gaming Comm'n*, 827 F. Supp. 26 (D.D.C. 1993). Seven federally recognized Indian Tribes, each alleging that it conducted gaming activities on Indian lands within the Tribe's jurisdiction, sued the original defendants for an injunction and a declaratory judgment, claiming that new regulations of the Indian Gaming Commission, promulgated under the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701–2721, were invalid and that the Commission improperly considered certain computerized games to be in a different regulatory category than their non-computerized counterparts. An eighth federally recognized Tribe, the Delaware Tribe of Western Oklahoma, later joined in the action. On September 23, 1993, a panel of this court, over Judge Henderson's dissent, granted the Tribes' motion for an injunction, pending appeal, forbidding the defendants from interfering with the Tribes' use and operation of certain gaming devices. In this expedited appeal, we vacate the injunction and affirm the judgment of the district court.

Congress enacted the Indian Gaming Regulatory Act in the wake of the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), holding that State gaming laws could not be enforced on Indian reservations within States otherwise permitting such gaming. With the objective of regulating tribal gaming operations on Indian lands, the Act established the Indian Gaming Commission as an agency within the Department of the Interior, 25

U.S.C. § 2704(a), and conferred upon the Commission the power and duty to monitor Indian gaming activities, to investigate and audit certain types of Indian gaming, to enforce the collection of civil fines, and to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of" the Act. 25 U.S.C. § 2706.

The Commission's principal responsibilities relate to what the Act designates as "class II gaming." *See* 25 U.S.C. § 2706(b). The Act divides all forms of gaming into three categories. 25 U.S.C. § 2703(6)-(8). "Class I gaming" consists of social games for prizes of minimal value and traditional forms of Indian gaming. 25 U.S.C. § 2703(6). These are considered within a Tribe's exclusive jurisdiction. 25 U.S.C. § 2710(a)(1). "Class II gaming" is "the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) . . . including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo,. . . ." 25 U.S.C. § 2703(7)(A).[1] Class II gaming does not include "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B)(ii). Tribes may engage in class II gaming on Indian lands in any State where such gaming is permitted for any purpose, so long as the particular form of gaming is not otherwise prohibited on Indian lands by federal law. 25 U.S.C. § 2710(b)(1). The Tribe must be the sole owner of the class II gaming enterprise. 25 U.S.C. § 2710(b)(2)(A).[2] The Act restricts the Tribe's use of the revenues from class II gaming and requires the Tribe to maintain a system of

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[1] Class II gaming also includes non-banking card games otherwise permitted by the State in which the Indian lands are located. 25 U.S.C. § 2703(7).

[2] A tribal ordinance or resolution may provide for ownership of class II gaming by another person as long as certain conditions are met. 25 U.S.C. § 2710(b)(4)(A).

controls to ensure the integrity of the gaming and the personnel operating it. 25 U.S.C. § 2710(b)(2)(B), (C) and (F). "Class III gaming" encompasses "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8). Class III gaming on Indian lands is permitted only if "such gaming is not otherwise specifically prohibited on Indian lands by federal law"; the Tribe enters into a compact governing gaming with the State in which the Indian lands are located; and the Secretary of the Interior approves the Tribal–State compact. 25 U.S.C. § 2710(b)(1)(A), (d)(1) and (d)(8).[3]

The game at issue in this case is "pull-tabs," one of the games included in the definition of class II gaming. The most common form of pull-tabs is the paper version. Gamblers purchase a card from a deck. The set of cards ("the deal") contains a predetermined number of winners. Upon purchasing the card, the gambler pulls the paper tab open to find out if he is a winner. In the paper version each gambler competes against all other gamblers in the hall playing the game. There is now a computerized version of pull-tabs. The computer randomly selects a card for the gambler, pulls the tab at the gambler's direction, and displays the result on the screen. The computer version, like the paper version, has a fixed number of winning cards in each deal. The computers may be interconnected so that each gambler simultaneously plays against other gamblers in "pods" or "banks" of as many as forty machines.

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[3] In the District of Columbia, in any possession of the United States, and in Indian country, the Johnson Act makes it unlawful to "possess" or "use" any "gambling device." 15 U.S.C. § 1175. The Johnson Act defines "gambling device" as a "machine or mechanical device" designed "primarily" for gambling and that, when operated, either delivers money or entitles the player to receive money "as the result of the application of an element of chance." 15 U.S.C. § 1171(a)(1) & (2). The Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(6), "repealed the applicability of the Johnson Act for class III devices subject to an extant, effective Tribal–State compact. There is no other repeal of the Johnson Act, either expressed or by

The focus on computer or video pull-tabs reflects a considerable narrowing of the case since the parties appeared before Judge Lamberth. Invoking the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, the Tribes then had challenged Commission regulations, promulgated in April 1992 (57 Fed. Reg. 12,382), defining class II gaming (25 C.F.R. § 502.3); class III gaming (25 C.F.R. § 502.4); "electronic, computer, or other technologic aid" (25 C.F.R. § 502.7); and "electronic or electromechanical facsimile" (25 C.F.R. § 502.8). Judge Lamberth's cogent opinion rejected each of the Tribes' arguments against these regulations as "either moot or meritless." 827 F. Supp. at 32.

In this appeal, the Tribes have devoted their arguments to a different question, the only one set forth in their Statement of Issues: "Did the district court err in finding that the video pull-tab games at issue in this case are class III 'electronic facsimiles' rather than class II pull-tab games which utilize 'electronic, computer or technologic aids' under §§ 2703(7)(A) and 2703(7)(B)(ii) of the Indian Gaming Regulatory Act and under §§ 502.7 and 502.8 of the Commission's regulations?" [4] Tribes' Brief at 2. This is the question raised by the final count of the Tribes' complaint, which asks for a declaratory judgment. 827 F. Supp. at 32. In ruling on it, we follow Judge Lamberth's carefully reasoned opinion and agree with him that the decision is "a simple one that may be accomplished solely by examining the statute itself (that is, without

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implication," in the Indian Gaming Regulatory Act. 827 F. Supp. at 31. Judge Lamberth therefore held that the Johnson Act remained "fully operative" with respect to class II gaming on Indian lands, which is permitted only if "not otherwise specifically prohibited on Indian lands by federal law." 25 U.S.C. § 2710(b)(1)(A). 827 F. Supp. at 31.

[4] 25 C.F.R. § 502.7 states:

> *Electronic, computer or other technologic aid* means a device such as a computer, telephone, cable, television, satellite or bingo blower and that when used—

looking to the Commission's rules)." 827 F. Supp. at 32. There is no need to consider the Tribes' general point that 25 C.F.R. §§ 502.7 and 502.8 sweep too many games otherwise within class II gaming into the category of class III gaming. For whatever might be said about the breadth of the regulations with respect to other games, "without any doubt" computerized pull-tab games of the type involved here "clearly are facsimiles of games of chance and therefore are class III gaming." 827 F. Supp. at 32.

Here, as in the district court, the Tribes concede that the video version of pull-tabs is the same game as the paper version. Tribes' Brief at 24; 827 F. Supp. at 28 n.2, 32. Because class II gaming does not include "electronic or electromechanical facsimiles of any game of chance" (25 U.S.C. § 2703(7)(B)(ii)), this concession alone demonstrates that the video game is not in the class II category. "By definition, a device that preserves the fundamental characteristics of a game is a facsimile of the game." *Sycuan Band of Mission Indians v. Roache*, 19 Indian L. Rep. 3079, 3080–81 (S.D. Cal. 1992). As commonly understood, facsimiles are exact copies, or duplicates. Although there may be room for a broader interpretation of "facsimile," the video version of pull-tabs falls within the core meaning of electronic facsimile. It exactly replicates the paper version of the game, and if that

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(a) Is not a game of chance but merely assists a player or the playing of a game;

(b) Is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and

(c) Is operated according to applicable Federal communications law.

25 C.F.R. § 502.8 states:

Electronic or electromechanical facsimile means any gambling device as defined in 15 U.S.C. 1171(a)(2) or (3).

is not sufficient to make it a facsimile, we doubt, as did Judge Lamberth (827 F. Supp. at 32), that anything could qualify.

The Tribes' contrary position is this: "the *only* point at which the use of electronics or other technology could fall into the class III category is where a different game—a copy, or imitation, something other than the genuine article; in plain English, a 'facsimile'—is created by such technology." All other uses of technology, according to the Tribes, should be considered "aids" within the meaning of § 2703(7)(A). Tribes' Reply Brief at 3–4. We view it as something other than "plain English" to say that only electronic versions of games different from the originals are exact duplicates. The meanings of words in a statute do not necessarily correspond with dictionary definitions. Context matters. So often does history. Yet there are limits to how far language, written in the formal style of a statute, may be wrenched. We would no sooner take "yes" to signify "no" than we would take "same" to denote only "different." One might stretch "facsimiles" to cover inexact copies, but the possibility of such a construction does not assist the Tribes. Even if the stretch were justified, the consequence would be to expand the category of games defined as facsimiles, not to constrict it. Exact duplicates—such as the video pull-tab games the Tribes wish to operate—would remain covered by § 2703(7)(B)(ii). In short, we agree with Judge Lamberth that, at the least, the Act's exclusion of electronic facsimiles removes games from the class II category when those games are wholly incorporated into an electronic or electromechanical version.

The sentences in the Senate Committee report to which the Tribes refer do not alter our judgment. Near the end of a lengthy paragraph discussing how separate Tribes might coordinate their gaming businesses, the following appears: "Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of

the bingo or lotto games.... In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players." S. REP. No. 446, 100th Cong., 2d Sess. 9 (1988). Pointing to the Report's caution about not using technology to change the "fundamental characteristics" of the games, the Tribes argue that an electronic version of a game cannot be a "facsimile" unless it fundamentally changes the game. While the Report is less than clear about the distinction between electronic aids and electronic facsimiles, Judge Lamberth's response is conclusive when it comes to the Tribes' video pull-tab game. As he wrote, this portion of the Report focuses not on how using technology might create an electronic facsimile, but on "*communications* technology that might be used to link bingo players in several remote locations." 827 F. Supp. at 33. That sort of technology is, as the Report itself recognizes, distinguishable from electronic facsimiles of the game itself. *See Spokane Indian Tribe v. United States*, 972 F.2d 1090, 1093 (9th Cir. 1992). To be sure, the only supposed electronic "facsimiles" mentioned in this paragraph of the Report are those in which "a single participant plays a game with or against a machine rather than with or against other players." Although in video pull-tabs the gambler is playing the game "with ... a machine," the Tribes are right that, as in paper pull-tabs, the gambler is playing against other gamblers. But the Tribes are wrong to suppose that the example mentioned in this passage must be the only type of electronic copies Congress meant to include under § 2703(7)(B)(ii). The Report says nothing of the sort and neither does the statute. An illustration given in one sentence of a committee report scarcely excludes the possibility of other examples. Still less does it, rather than the language of the statute, express the will of Congress.

Ambiguous statutes, the Tribes tell us, should be construed in favor of the Indians. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Congress believed the Indian Gaming Regulatory Act would benefit Indians in several ways. The Tribes focus on the Act's objective of advancing tribal economic interests. The Act has another objective, however: protecting tribes and their members from the dangers associated with large-scale gaming operations. Which construction of the Act favors the Indians, the one including electronic pull-tab games under class II gaming or the one placing this version of the game under the more restrictive category of class III? In this case there is no need to choose. When the statutory language is clear, as it is here, the canon may not be employed. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986).

The injunction pending appeal is vacated and the judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CABAZON BAND OF MISSION INDIANS, et al.,	)	
	)	Civil Action No. 92-1103
Plaintiffs,	)	
	)	(RCL)
vs.	)	
	)	
NATIONAL INDIAN GAMING COMMISSION, et al	)	
	)	
Defendants.	)	
	)	

ORDER AND FINAL JUDGMENT

This case comes before the court on motions for summary judgment filed by plaintiffs (two motions were filed on behalf of plaintiffs), defendants, and intervenor-defendants. Also before the court is the State of Alabama's motion to dismiss the counterclaim filed by the Poarch Band of Creek Indians. Upon consideration of these motions, the memoranda in support of them, and the oppositions and replies filed by the parties, and for the reasons stated in the accompanying memorandum opinion, it is hereby ORDERED that:

1. Plaintiffs' motions for summary judgment are DENIED.

2. Defendants' motion and intervenor-defendants' motion for summary judgment are GRANTED, and FINAL

JUDGMENT is hereby entered for defendants and intervenor-defendants.

3. The motion to dismiss filed by the State of Alabama is GRANTED. The counterclaim filed by plaintiff Poarch Band of Creek Indians is DISMISSED WITH PREJUDICE.

4. This case is DISMISSED WITH PREJUDICE.

5. Plaintiffs, motion for postponement of hearing is DENIED AS MOOT.

SO ORDERED.

/s/
Royce C. Lamberth
United States District Judge

DATE: June 28, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CABAZON BAND OF MISSION INDIANS, et al.,	)	
	)	Civil Action No. 92-1103
Plaintiffs,	)	
	)	(RCL)
vs.	)	
	)	
NATIONAL INDIAN GAMING COMMISSION, et al	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

Before the court are rules promulgated by the National Indian Gaming Commission under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq; all parties have moved for summary judgment. Upon consideration of the memoranda filed by all plaintiffs, by defendants, and by intervenor-defendants, and for the reasons stated below, the court finds that plaintiffs' objections to the rules are meritless. Thus, plaintiffs' motions for summary judgment shall be denied. Defendants' and intervenor-defendants' motions for summary judgment shall be granted, and final judgment shall be entered for defendants and intervenor-defendants. The State of Alabama's motion to dismiss the counterclaim filed by the Poarch Band of Creek Indians is also granted and this counterclaim is dismissed with prejudice.

I. INTRODUCTION.

Following the Supreme Court's decision in State of California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (authorizing gaming in Indian country), Congress enacted the Indian Gaming Regulatory Act ("IGRA"), codified at 25 U.S.C. § 2701 et seq. The Act, inter alia, codified the right of Indian tribes to conduct limited gaming on Indian lands; established the National Indian Gaming Commission ("the Commission") to implement and oversee the Act; and divided the various types of gaming into three "classes," each of which is subject to differing levels of state and federal regulation and involvement.

At issue in this case are rules relating to two of those three classes.[1] Class II gaming, the definition of which includes bingo and games comparable to it as well as non-banking card games, is subject to the provisions of IGRA and to state law, but remains within the jurisdiction of the Indian tribes. All games which do not qualify for class I or class II (examples include banking card games such as baccarat and casino games such as roulette) fall into the residuary category of class III gaming; such games are lawful only if the Indian tribe and the relevant State enter into a Tribal-State compact allowing such gaming. Although the Act anticipates that the States will negotiate such compacts in good faith, 25 U.S.C. § 2710(d)(3)(A), several Indian tribes assert that they have had difficulty reaching agreements with the States. Since only class III gaming requires such a compact, it is

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[1] Class I gaming is limited largely to social games for minimal prizes and is not subject to any state or federal oversight or regulation. 25 U.S.C. § 2703(6). Class I gaming is not relevant to these proceedings.

imperative for the Indian tribes that the definition of class II gaming be as expansive as possible.

Important in the distinction between class II gaming and class III gaming are the definitions of (as well as the allowable uses of) "electronic, computer or other technologic aids," 25 U.S.C. § 2703(7)(A)(i) and 25 C.F.R. § 502.7, and "electronic or electromechanical facsimiles," 25 U.S.C. § 2703(7)(B)(ii) and 25 C.F.R. § 502.8. The former may be used with respect to bingo, a class II game; the latter are relegated to class III. Thus, it is again imperative for the Indians that the definition of aids be as broad as possible.

The Commission promulgated Definitions under IGRA in its Proposed Rule and Public Hearings, dated November 1, 1991. 56 Fed. Reg. 56278. After five public hearings, the Commission released on April 9, 1992, its final Rule and Definitions. 57 Fed. Reg. 12382, codified at 25 C.F.R. § 502.1 et seq. In Claims One, Two, and Three of their four-count complaint, plaintiffs challenge several of the subsections of the Commission's final rule as arbitrary and capricious, beyond statutory authority, and contrary to law under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. In their final claim, plaintiffs request a declaratory judgment that video and computer assisted pull-tab games[2] qualify as class II games.

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[2] In traditional paper pull-tab games, players purchase outwardly-identical cards from a stack of cards (the "deal"); the deal includes a pre-determined number of winning and losing cards. The player opens the tab and finds out if the card is a winner. The computer version, by plaintiffs' admission, is identical in all respects to the paper version except that the computer selects a "card" from a randomly created "deck" and pulls the "tab" for the player, displaying the result on the video screen. (The terms in the preceding sentence are in quotations as the card, deck, and tab are not physically extant, but rather are computer-

Plaintiffs are eight Indian tribes[3] that conduct gaming on Indian lands by using video and computer assisted pull-tab games which, plaintiffs assert, Congress meant to be within the class II definition but which the Commission allegedly has redefined illegally as class III games. Defendants are the Commission, its chairman, the Department of the Interior (and its secretary), and the Department of Justice (and the Attorney General). In addition, fifteen states[4] have intervened in the case as defendants. Both defendants and intervenor-defendants have filed cross-motions for summary

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generated.) Just as with paper pull-tab games, the computer version has a fixed number of winning cards in its "deal." Plaintiffs assert that each gambler competes against other gamblers in both space and time since (1) five video screens are linked to the same computer deal, thus allowing for five individuals to play simultaneously; and (2) the computer continues to draw from the same deal over time until a set number of cards have been purchased by gamblers playing the computer, at which point the computer creates a new random deal.

Plaintiffs readily acknowledge that - save the medium - all aspects of the paper version of pull-tabs are replicated in the video version.

[3] Seven tribes initiated the lawsuit. They are the Cabazon Band of Mission Indians, the Eastern Band of Cherokee Indians, the Poarch Band of Creek Indians, the Pueblo of Isleta, Rumsey Rancheria, the San Manuel Band of Mission Indians, and the Spokane Tribe. An eighth plaintiff, the Delaware Tribe of Western Oklahoma, joined the lawsuit on February 3, 1993, and agreed to be bound by all decisions of this court. Plaintiffs have filed two sets of summary judgment motions, one filed by the Poarch Band of Creek Indians; the second filed on behalf of the other plaintiffs.

[4] Alabama, Arizona, California, Colorado, Connecticut, Florida, Idaho, Kansas, Michigan, Mississippi, Nebraska, North Dakota, South Dakota, Wisconsin, and Wyoming.

judgment.[5]

Finally, the Poarch band has also filed a counterclaim against intervenor-defendant State of Alabama. Alabama has filed a motion to dismiss the counterclaim.

II. ADMINISTRATIVE PROCEDURE ACT CHALLENGES.[6]

In the first three claims in their four-count complaint, plaintiffs challenge several aspects of the Commission's final rule as arbitrary and capricious, beyond statutory authority, and contrary to law under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. The court finds that the legislative rules promulgated by the Commission are perfectly consistent with Congress' unambiguous intent as embodied in IGRA. Therefore, defendants' and intervenor-defendants' motions for summary judgment as to these three claims will be granted; plaintiffs' motions for summary judgment as to these

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[5] This case is ideally suited for disposition by summary judgment. As all parties acknowledge, there are few - if any - issues of fact, and certainly no genuine issues of material fact which could preclude entering judgment for any party. Fed. R. Civ. P. 56(c). See Anderson v. Liberty-Lobby, 477 U.S. 242 (1986). Rather, the issues are limited to disputes of law.

[6] Defendants have not challenged plaintiffs' right to bring this suit. Nonetheless, it is the responsibility of the court to determine that it has jurisdiction to hear this challenge. The court finds that jurisdiction in this court is proper for both the APA challenges as well as the declaratory judgment action under 28 U.S.C. §§ 1331 as well as 5 U.S.C. S 702. Plaintiffs have demonstrated that there is a ripe, justiciable controversy in that plaintiffs face prosecution for violations of federal law if they continue to use the video pull-tab games at issue here. Similarly, venue is proper in this court pursuant to 28 U.S.C. S 1391(e) and 5 U.S.C. S 703.

three claims will be denied.

Under the APA, a court reviewing an agency's legislative rule-making must first examine the statute and determine whether Congress has unambiguously expressed its intent. Chevron, U.S.A. v. National Resources Defense Council, 467 U.S. 837, 842-43 (1984). If Congress has been unambiguous, neither the agency nor the court may diverge from that intent. Such is the case here.

A. 25 C.F.R. § 502.3.

First, plaintiffs challenge 25 C.F.R. § 502.3, the definition of "class II gaming."[7] Plaintiffs challenge the Commission's determination that the parenthetical "(whether or not electronic, computer, or other technologic aids are used)" should not be included in the description of the sub-games of pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo in 25 C.F.R. § 502.3(b). Plaintiffs assert that the Commission's failure to include the parenthetical in subsection (b) means that the use of such aids is prohibited with respect to those sub-games. The court finds otherwise.

In its initial rule, the commission divided the two categories of class II gaming enunciated in 25 U.S.C. §

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[7] Class II gaming means:

(a) Bingo or lotto (whether or not electronic, computer, or other technologic aids are used)

. . .

(b) If played in the same location as bingo or lotto, pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo;

. . .

25 C.F.R. § 502.3.

2702(7)(A) bingo (including the sub-games of pull-tabs, lotto, and the like] and non-banking card games) into three categories (bingo, the sub-games, and non-banking card games). As to the first two categories, the Commission included the parenthetical "(whether or not electronic, computer, or other technologic aids are used)," thus mirroring the construction of 25 U.S.C. § 2703 (7) (A) (i).[8] In the final rule, however, the commission stated that the parenthetical only modifies preceding language and thus removed the parenthetical from the § 502.3(b).

However, the Commission did not - and the rules do not - prohibit the use of such aids with respect to the sub-games. In fact, in its commentary to the final rule, the Commission noted "that in its view so long as technology does not fall under the definition of gambling devices under the Johnson Act (15 U.S.C. 1171), it is not prohibited." 57 Fed. Reg. at 12383. In other words, under the Commission's rules, technologic aids may be used with the sub-games.[9]

In short, contrary to plaintiffs' assertions, the court finds

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[8] The term 'class II gaming' means -

(A) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) -

. . .

including (if played in the same location) pull-tabs, lotto,, punch boards, tip jars,- instant bingo, and other games similar to bingo. . . .

25 C.F.R. § 2703(7).

[9] The intervenor-defendants also readily admit this fact in their memoranda.

that the use of aids is not prohibited by 25 C.F.R. § 502.3(b); rather, the Commission has specifically stated that the use of such technology is permitted with the sub-games, just as it is with bingo. Therefore, plaintiffs' objections are rejected as moot.

B. 25 C.F.R. § 502.4.

Plaintiffs also challenge 25 C.F.R. § 502.4, the definition of "class III gaming."[10] Since Congress defined "class III gaming" negatively,[11] plaintiffs assert that it was unlawful for the Commission to promulgate an affirmative definition. This objection is frivolous. In its definition, the Commission included non-exclusive examples of class III

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[10] Class III gaming means all forms of gaming that are not class I gaming or class II gaming, including but not limited to:

(a) Any house banking game, including but not limited to - -
  (1) Card games such as baccarat, chemin de fer, blackjack (21), and pai gow (if played as house banking games);
  (2) Casino games such as roulette, craps, and keno;
(b) Any slot machines as defined in 15 U.S.C. 1171(a)(1) and electronic or electromechanical facsimiles of any game of chance;
(c) Any sports betting and parimutuel waging including but not limited to wagering on horse racing, dog racing, or jai alai; or
(d) Lotteries.

25 C.F.R. § 502.4

[11] The term 'class III gaming' means all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8).

gaming, all of which were either listed specifically in the statute (subsections (a)(1) and (b) of the Commission's definition) or enumerated in the accompanying Senate Report (subsections (a)(2), (c), and (d)). Moreover, and most importantly, the definition retains - verbatim - the statutory definition in its opening clause. Merely providing clarifying examples explicitly derived from the statute or its legislative history can hardly be termed contrary to law. All challenges to § 502.4 therefore are meritless and are denied.

C. 25 C.F.R. § 502.7.

Similarly, plaintiffs challenge 25 C.F.R. § 502.7, the definition of "electronic, computer, or other technologic aid."[12] The court finds that the Commission's definition exactly tracks the language of the Senate Report. See S. Rep. No. 446, 100th Cong., 2d Sess. 9 (1988), reprinted in 1988 U.S. Code Cong. & Ad. News 3079. Where Congress' intent is clear and the agency's actions implement that unambiguous intent, a reviewing court has no power (nor any desire, for that matter) to overturn such lawful activity. All challenges to § 502.7 therefore are meritless as well.

D. 25 C.F.R. § 502.8.

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[12] Electronic, computer or other technologic aid means a device such as a computer, telephone, cable, television, satellite or bingo blower and that when used –

(a) Is not a game of change but merely assists a player or the playing of a game;

(b) Is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and

(c) Is operated according to applicable Federal communications law.

25 C.F.R. § 502.7.

Finally, plaintiffs also challenge 25 C.F.R. § 502.8, the definition of "electronic or electromechanical facsimile."[13] The adopted definition of "gambling device" is taken from the Johnson Act,[14] 15 U.S.C. § 1171 et seq. This definition is the only definition possible in order to implement Congress' explicit intent, as expressed in IGRA.

In 25 U.S.C. § 2710(d)(6), Congress repealed the applicability of the Johnson Act for class III devices subject to an extant, effective Tribal-State compact. There is no other repeal of the Johnson Act, either expressed or by implication,[15] in IGRA. In fact, in 25 U.S.C. § 2710(b)(1)(A), Congress specifically states that class II gaming is subject to Federal law and the Senate Report states that the applicable "Federal law" is the Johnson Act, 15 U.S.C. § 1175. S. Rep. No. 466 at 12. Therefore, save the explicit, limited repeal in 25 U.S.C. § 2710(d)(6), the Johnson Act remains fully operative; it was not repealed by IGRA.

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[13] Electronic or electromechanical facsimile means any gambling device as defined in 15 U.S.C. 1171(a)(2) or 25 C.F.R. § 502.8.

[14] The Johnson Act not only defines gambling devices, 15 U.S.C. § 1171(a), but also makes possession of any such device illegal in Indian country, 15 U.S.C. § 1175.

[15] Without an irreconcilable conflict between the new statute and an earlier statute from which a repeal by implication may be inferred, or clear and manifest intent to repeal an earlier statute, repeals by implication are not favored. Rodriguez v. United States, 480 U.S. 522 (1987). There is no conflict between the Johnson Act and IGRA here, much less an irreconcilable conflict; nor is there a clear and manifest intent to repeal the Johnson Act. Thus, the court finds that there is no repeal by implication. See United States v. Burn, § 725 F.Supp. 116, 124 (N.D.N.Y. 19089), aff'd sub nom United States v. Cook, 922 F.2d 1026 (2d Cir. 1991).

Regarding the use of technology, the distinction between class II and class III, according to IGRA, is that the use of "aids" is permitted for certain class II games; the use of "facsimiles" is permitted only in class III games and only when the Indians have entered into a Tribal-State compact. When this distinction is combined with the limited repeal of the Johnson Act, it is plainly evident that IGRA's "facsimiles" are the Johnson Act's "gambling devices." On the one hand, given the statutory definition of gambling devices in the Johnson Act and the common sense definition of facsimile, it is impossible for the definition of facsimile to be broader than that of gambling device; every facsimile of a game of chance is necessarily a Johnson Act gambling device. On the other hand, if the definition of facsimiles were less broad than that of gambling devices, IGRA would be internally contradictory: technology that - ostensibly - now would be allowed for class II gaming under 25 U.S.C. § 2703(7)(A) would be prohibited by the Johnson Act (since the repeal of the Johnson Act is only for class III gaming). Thus, only a definition of facsimile that is equivalent to that of gaming device renders the statute internally consistent and allows both statutes peaceably to coexist.

Plaintiffs' main objection to the commission's definition stems from their perception that the definition of gambling device sweeps within its ambit any device that might be used in gambling. This interpretation of the Johnson Act is incorrect. As several cases have held,[16]

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[16] See, e.g., Lion Manufacturing v. Kennedy, 330 F.2d 833, 836-37 (D.C. Cir. 1964) ("[15 U.S.C. § 1171] reflects a purpose by the Congress to address itself only to those machines which, although differing from the slot machine in physical design, are calculated to function quite as effectively in separating the public from its money on a large scale."); United States v. 137 Draw Poker-type Machines, 606

Congress has acknowledged,[17] and the Commission has noted in the preamble to its rules, the Johnson Act applies only to slot machines and similar devices (including the pull-tab games here in issue), not to aids to gambling (such as bingo blowers and the like). When the scope of the Johnson Act is properly determined, it is clear that the definition of gambling devices is significantly less broad than plaintiffs fear. Moreover, it is clear that Congress' intent in IGRA is fulfilled only when IGRA's definition of facsimile adopts the Johnson Act's definition of gambling devices.

E. Conclusion.

Therefore, plaintiffs' challenges under the Administrative Procedure Act are either moot or meritless. Plaintiffs' motions for summary judgment as to Claim One, Two, and Three of their complaint are denied. Defendants' and intervenor-defendants' motions for summary judgment as to Claim One, Two, and Three are granted.

III. DECLARATORY JUDGMENT

More important to plaintiffs than the APA challenges, however, is their declaratory judgment claim. The fourth and final count in plaintiffs' compliant requests that the court enter a declaratory judgment determining whether the video pull-tab games at issue here fall within the scope of class II or fall into the residuary category, class III. Regardless of the court's findings in Part II., above, the court's holding as

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F. Supp. 747 (N.D. Ohio 1984), aff'd, 765 F.2d 147 (6th Cir. 1985).

[17] [15 U.S.C. § 1175] prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo or lotto." S. Rep. No. 466 at 12.

to the declaratory judgment effectively settles the issue.

The court finds that the decision regarding the declaratory judgment is a simple one that may be accomplished solely by examining the statute itself (that is, without looking to the Commission's rules). Without any doubt, the video pull-tab games clearly are facsimiles of games of chance and therefore are class III gaming. Thus, defendants' and intervenor-defendants' motions for summary judgment as to this claim will be granted and plaintiffs' motions for summary judgment as to this claim will be denied.

IGRA defines class II gaming both affirmatively and negatively. Affirmatively, class II includes the game of chance known as bingo, several sub-games, and certain authorized (or, at least, not prohibited) non-banking card games. 25 U.S.C. § 2703(7)(a). Negatively, class II does not include, among other things, "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B)(ii).

Of course, one of the cardinal rules of statutory interpretation is that the court must give effect to Congress' explicit language and to each word and provision of the statute. Michigan Citizens for an Independent Press v. Thornburgh, 868 F.2d 1285, 1293 (D.C. Cir.), aff'd, 493 U.S. 38 (1989). The definition of facsimile is "an exact and detailed copy of something." Webster's Third New International Dictionary 813 (1965). Plaintiffs acknowledge (and even take comfort in the fact) that the video pull-tabs exactly replicate the paper version of the game and preserve all the fundamental characteristics of the paper version. In other words, the game is an electronic facsimile of the paper game of chance known as pull-tabs. See Sycuan Band of

Mission Indians v. Roache, No. 91-1648 H (BTM) (S.D. Cal., Mar. 30, 1992).

Plaintiffs readily admit that the video pull-tab game exactly replicates the paper pull-tab game. Thus, if the court were to find that the electronic version of pull-tabs were not an electronic facsimile of the paper game, the statutory provision in 25 U.S.C. § 2703(7)(B)(ii) would be rendered absolutely meaningless. If the video pull-tab game is not an electronic facsimile, the court cannot imagine what would qualify as one. In order to give meaning to the statute, therefore, the court must recognize that what amounts to a tautology indeed is true: a facsimile is a facsimile is a facsimile.[18]

All of plaintiffs' objections to this finding are meritless. First, plaintiffs assert that the court must interpret any ambiguity in favor of the Indians. See Bryan v. Itasca County, 426 U.S. 373, 392 (1976); Albuquerque Indian Rights v. Lujan, 930 F.2d 49, 59 (D.C. Cir. 1991). Where, as here, the statute is painfully explicit, however, there is no ambiguity to interpret. Therefore, this principle of statutory interpretation has no place.

Second, plaintiffs allege that the legislative history of IGRA suggests that Congress intended that the Indians be able to make use of appropriate technology: "The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility." See S. Rep. No. 446 at 9.

This argument fails for several reasons. First, this

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[18] Paraphrased with apologies to Gertrude Stein.

court need not resort to legislative history when the statute is as clear and explicit as IGRA. However, the legislative history actually supports the obvious reading of the statute delineated above. The Senate Report quoted above continues with a description of the type of technology Congress meant when it suggested "maximum flexibility": communications technology that might be used to link bingo players in several remote locations. "In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players." Id. Video pull-tab games are just such facsimiles, and explicitly are not part of the technology Congress intended to be class II aids. See Spokane Indian Tribe v. United States, 972 F.2d 1090, 1093 (9th Cir. 1992), affirming Spokane Tribe of Indians v. United States, 782 F. Supp. 520, 524 (E.D. Wash. 1991).

Plaintiffs also argue that no electronic game can be a facsimile of a paper game; in their view, an electronic game can only be a facsimile of another electronic game. Congress, however, clearly was not so simple-minded when it enacted IGRA, and there is no doubt that Congress intended that electronic facsimiles of paper games of chance be class III games.

Finally, plaintiffs rely once again on the Senate Report and assert that since five video games are networked with one computer, each gambler plays against other gamblers (both in space and time) and thus does not "play] a game . . . against a machine." Plaintiffs' narrow reading of the statute obviously circumvents Congress' clear and unambiguous intent as expressed in IGRA and its legislative history: that electronic facsimiles of games of chance - like

video pull-tabs - are class III games. See Spokane Indian Tribe, 972 F.2d at 1093.

In short, Congress' intent, as expressed in the statute and the legislative history, is clear and unambiguous, and the court - without difficulty - finds that the video pull-tabs game using computerized opportunities in a finite group, or "deal," of such opportunities comprised of a pre-determined mix of winning and losing opportunities which, when such opportunities are purchased by the player, are displayed and its symbols revealed on a video screen, is a class III "electronic facsimile" under 25 U.S.C. § 2703(7)(B)(ii). In fact, the video pull-tabs game is exactly the sort of electronic facsimiles that Congress specifically excluded from class II gaming. Therefore, defendants' and intervenor-defendants' motions for summary judgment as to Claim IV of plaintiffs' complaint is granted; plaintiffs' motions for summary judgment as to the same count is denied.

IV. STATE OF ALABAMA'S MOTION TO DISMISS.

After intervenor-defendants were granted leave to intervene, plaintiff Poarch Band of Creek Indians filed a counterclaim against the State of Alabama for declaratory and injunctive relief. The State moved this court to dismiss the counterclaim. The State's motion to dismiss is granted.

The issues raised in Poarch's counterclaim - that Alabama has failed to negotiate a Tribal-State compact in good faith - have already been raised in another lawsuit, Poarch Band of Creek Indians v. Alabama. That case, brought in the Southern District of Alabama, was dismissed for lack of jurisdiction since, the court found, Alabama had not waived its Eleventh Amendment immunity. 784 F. Supp.

1549 (S.D. Ala. 1992).[19]

Unless the facts which led the Alabama district court to find that there was no jurisdiction have changed since that court dismissed Poarch's claim, the doctrine of res judicata will necessarily leave this court without jurisdiction as well. This court is bound by precedents in this circuit which include Dozier v. Ford Motor Co., 702 F.2d 1189 (D.C. Cir. 1983), in which the Court of Appeals held that the doctrine of res judicata applies to a dismissal for lack of jurisdiction unless a "curable defect" has been remedied in the interim. The curable defect in this case, Alabama's Eleventh Amendment immunity, remains intact today.

The court's finding that Alabama has not waived its Eleventh Amendment immunity is based on several points. First, Alabama's entry into this lawsuit was for two extremely limited purposes: first, the litigation of whether the Commission violated the APA; and second, the determination of a declaratory judgment regarding the proper status of video pull-tab games. The States, in their motion to intervene, specifically limited their entry to these issues and expressly did not waive their immunity as to other issues, including suits brought under 25 U.S.C. § 2710(d)(7)(A) (the statute under which Indian tribes may bring suit for a State's failure to negotiate in good faith). Therefore, the State of Alabama did not expressly waive its Eleventh Amendment immunity, but rather expressly maintained it.

Second, the State did not implicitly waive its immunity either. Typically, for a court to find an implicit

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[19] See also 776 F. Supp. 550 (S.D. Ala. 1991) (same decision on earlier motion to dismiss) . Both decisions are currently on appeal to the Eleventh Circuit Court of Appeals (No. 92-6244).

waiver of Eleventh Amendment immunity, the court must make two findings: first, that the counterclaim arises from the same event; and second, that the counterclaim is defensive, typically in the nature of recoupment. Woelffer v. Happy States of America, Inc., 626 F. Supp. 499, 502 (N.D. Ill. 1985). As for the second prong of this test, the counterclaim should not be "for the purpose of obtaining an affirmative judgment against the State." Ibid. (citation omitted).

Here, the Poarch counterclaim fits neither of these categories. As to the first category, although it is true that the subject of both lawsuits is related (in that both involve IGRA), the similarities end there. The underlying suit here is one involving the APA and asking the court for an interpretation of 25 U.S.C. §§ 2703(7) and 2703(8). The Poarch counterclaim, on the other hand, is a suit premised on 25 U.S.C. § 2710(d)(7)(A) and seeks declaratory and injunctive relief against the State of Alabama based on the State's alleged failure to negotiate in good faith. None of the issues necessary for determination of the counterclaim have arisen in the underlying action; nor do the cases arise from the same event. The only connection between the two suits is that both involve IGRA (although different sections thereof).

Poarch similarly fails the second part of the test. Rather than seeking defensive relief, Poarch here seeks an affirmative judgment against the State of Alabama. In Woelffer, also an injunction case, the court found that an injunction of the type plaintiffs seek could not be termed defensive. The court reaches the same result here. Poarch seeks to go significantly beyond the bounds of the present suit and obtain an affirmative judgment that the State of Alabama has failed to negotiate in good faith as well as an injunction that would force a Tribal-State compact. Such a

judgment cannot be termed defensive. Thus, the court finds that the State of Alabama did not implicitly waive its Eleventh Amendment immunity.

Third, it is not at all clear that the State of Alabama's counsel would even have had the power to waive the State's Eleventh Amendment immunity. See Alabama v. Pugh, 438 U.S. 781 (1978); Keenan v. Washington Metropolitan Area Transit Authority, 643 F. Supp. 324 (D.D.C. 1986). Under Alabama's Constitution, Article 1, § 14, officials in Alabama have no authority to waive the State's immunity.

As a result of each of these facts, the court finds that the State of Alabama did not waive its Eleventh Amendment immunity. The Dozier "curable defect" has not been cured, therefore, and the doctrine of res judicata applies. The State of Alabama's motion to dismiss the Poarch counterclaim is granted; the counterclaim filed by plaintiff Poarch Band of Creek Indians is dismissed with prejudice.

V. CONCLUSION.

Plaintiffs' briefs are filled with information regarding the importance of video pull-tabs to tribal economies and the potential security benefits of computerized versions of the game. Concerns of this sort, however, do not assist a court examining an unambiguous statute like IGRA. Here, Congress has clearly expressed its intent that electronic facsimiles of games of chance - like video pull-tab games - not be within the jurisdiction of the Indian tribes (class II gaming), but rather be subject to Tribal-State compacts (class III gaming). Despite plaintiffs' numerous attempts to alter this conclusion, it is inescapable. Therefore, plaintiffs' motions for summary judgment must be and are denied, and defendants' and defendant-intervenors' motions for summary

judgment must be and are granted. Finally, the State of Alabama's motion to dismiss the Poarch counterclaim is granted; the counterclaim filed by plaintiff Poarch Band of Creek Indians is dismissed with prejudice.[20]

/s/
Royce C. Lamberth
United States District Judge

DATE: June 28, 1993

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[20] Plaintiffs requested oral argument on their pending motions, and the court had scheduled argument for 10:00 a.m. on July 2, 1993. However, plaintiffs then moved for a continuance of that hearing as Senators Daniel Inouye and John McCain, Chairman and Vice Chairman of the Senate Indian Affairs Committee, have scheduled a hearing on Indian gaming for that date. Rather than postponing the oral argument on this issue, the court believes it expedient to render its decision on this statute prior to the Senate's hearing. If plaintiffs ultimately are to receive relief, that relief is going to come not from a court impermissibly redefining words of a statute so as to reach a desired end, but from Congress, the institution with the power properly to delimit the scope of the Indians' right to conduct gaming. The court sincerely hopes that this decision will assist Congress in its formulation of amendments to IGRA.

Plaintiffs' motion for a continuance of the oral argument therefore is denied as moot.

UNITED STATES COURT OF APPEALS
For The District Of Columbia

NO. 93-5255

September Term, 1993
USDC CV 92-01103

Cabazon Band Mission Indians, et al.,

Appellants,

v.

National Indian Gaming Commission, et al.

Appellees

BEFORE: Wald, Ginsburg, and Randolph, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing, filed March 10, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:

Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
For The District Of Columbia

NO. 93-5255 September Term, 1993
USDC CV 92-01103

Cabazon Band Mission Indians, et al.,

Appellants,

v.

National Indian Gaming Commission, et al.

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph and Rogers, Circuit Judges

ORDER

Appellants' Suggestion For Rehearing In Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:
Robert A. Bonner
Deputy Clerk

Circuit Judge Rodgers did not participate in this matter.

Appendix D -1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CABAZON BAND OF MISSION INDIANS, ET AL.,	)	
Plaintiffs,	)	Dkt. No. 92-1103 (Lamberth)
NATIONAL INDIAN GAMING COMMISSION, et al.,	)	

AFFIDAVIT OF EDDIE L. TULLIS

STATE OF ALABAMA

COUNTY OF ESCAMBIA

EDDIE L. TULLIS, being first duly sworn, deposes and says:

1. I am Tribal Chairman and Chief Executive Officer of the Tribal Counsel for the Parch Band of Creek Indians ("the Tribe"), a position I have held since 9166. I reside adjacent to the reservation of the Parch Band of Creek Indians near Atmore, Alabama, and I am over twenty-one (21) years of age. I am also Chairman of the National Advisory Council on Indian Education (1980 to present); a member of the Board of Directors of Native American Rights Fund; a member of the Indian Nations at Risk Task Force of the United States Department of Education; and President of the United South and Eastern Tribes, an organization representing 20 eastern Indian tribes on local, regional and national issues. Previously, I served as area vice president and first vice-president of the National Congress of American

Indians. In addition, I serve in leadership roles concerning Indian rights in several other organizations.

2. The Tribe, which now number 1,988 members, has existed as a distinct political unit since before the Creek War of 1813-14. Until June 11, 1984, when the federal government recognized it as an Indian Tribe, organized pursuant to 25 CFR Part 83, the Tribe operated as a Creek Nation East of the Mississippi, a non-profit entity.

3. Since receiving federal recognition, the Tribe has shifted its focus and emphasis to economic development. In addition to several small manufacturing subsidiaries, the Tribe opened the Creek Bingo Palace in April, 1985 in order to increase tribal revenues. The Tribe has invested $1,900,000.00 in the construction, equipment and operation of the Palace.

4. After Congress passed the Indian Gaming Regulatory Act ("IGRA") in 1988, the Tribe steadily expanded its operations at the Palace from four nights to twenty nights per month, resulting in the hiring of 25 additional employees and an increase of approximately 50,000 man-hours worked per year. In addition to Bingo, the Palace began offering customers the opportunity to play the games of pull-tabs, mega-pick, mega bingo and fortuNet. This grown has increased Tribal revenue by 250% in the last four years.

5. In 1991, net annual revenues from the Palace totaled $8,432,000.00, an increase of 90.3% over 1990. Figures for the first quarter of 1992 show an increase of 67.3% in revenues over the first quarter of 1991.

6. The Palace now has 132 employees and is the

Tribe's major source of revenue, providing substantial funds for governmental and social services for tribal members, such as health, education, welfare, fire protection, law enforcement, housing, judicial services and the purchase of additional tribal lands. This self generated source of review greatly reduces our need for governmental assistance.

7. As it developed the Palace, the Tribe took advantage of modern technology to enhance its gaming activities. For example, using satellite hook ups with other tribes, bingo boards, and computers that allow a person to play up to 256 games at one time.

8. After enactment of IGRA, the Tribe also introduced computer-aided pull-tab games, which were designed to comply with the definition of "class II gaming" permitted by IGRA.

The machines we purchased were manufactured by U.D. Games and were delivered and installed by Mike Pace, President of U.S. Games. The machines are named "Pot-O-Gold" and the software was provided by U.S. Games.

The computer-aided pull-tabs is played in exactly the same way as the paper game that has been played for many years in many tribal bingo halls. "Deals" of all winning and losing pull-tabs are sold to the players. Players compete against each other to get winning combinations of symbols shown on the front of the "pull-tabs". The successful player can win a progressive jackpot as well as other prizes. In the computer game, each player plays against one to four other players in "pods" of five machines, programmed to create the games and "networked" or interconnected to permit competitive play. The players do not compete against the computer or the "house." These electronic games have

greatly improved security of our operations by making the games more secure from deception and defalcation.

9. The Tribe had received information from both federal and state authorities indicating that computer-aided pull-tabs fell within the definition of "class II gaming" as set forth in IGRA. First, the Attorney General of the State of Alabama on January 11, 1991, issued an opinion stating that the "Pot-of-Gold" computer-aided pull-tab games that we used, in fact, constituted class II gaming. A copy of that opinion is attached to this affidavit, although the succeeding Attorney General stated that he did not consider that opinion to be the State's official view and "revoked" the previous opinion. We also received a copy of a letter from Bill Ott, Eastern Area Director of the Bureau of Indian Affairs, dated January 11, 1991, stating that computer-aided pull-tabs constitute class II gaming. A copy of that letter is attached to this affidavit.

10. On April 9, 1992, the National Indian Gaming Commission issued regulations, effective May 11, 1992, that classified computer-aided pull-tabs as "class III gaming" instead of "class II gaming."

11. Under IGRA, the Tribe may engage in "class III gaming" only if the State of Alabama enters into a compact with the Tribe to permit such gaming. The State of Alabama refused even to negotiate with the Tribe about such a compact. After trying unsuccessfully for more than a year to initiate discussions with the State on a compact, the Tribe sued the State and the governor in the United States District Court for the Southern District of Alabama in Mobile to force negotiations. The State and the Governor by separate motions raised a defense of immunity under the Eleventh Amendment to the United States Constitution. The United

States District Court granted both motions and dismissed the Tribe's suit. The Tribe has now appealed. Unless and until reversed on appeal or the Congress acts to provide alternatives, the Tribe cannot conduct "class III gaming" on its Reservation without risking civil and criminal penalties under IGRA, including fines, imprisonment and seizure of its gaming equipment.

12. On May 6, 1992, the United States Attorney for the Southern District of Alabama wrote to me, as Chairman of the Tribal Counsel, that he intended to begin enforcing IGRA, specifically citing devices that are considered class III gaming pursuant to the regulations issued by the Indian Gaming Commission. A copy of that letter is also attached to this affidavit.

13. I have observed various forms of illegal gaming taking place in South Alabama that is openly advertised and, to my knowledge, never prosecuted or are the parties threatened with prosecution. These activities are not "charity" bingo events as authorized by law, but are illegal "casino nights" and other forms of illegal gaming.

14. Based upon the United States Attorney's clear threat of criminal prosecution, the Tribe discontinued operation of its computer-aided pull-tab games on May 10, 1992, rather than face criminal indictment and prosecution.

15. Over 80% of the annual net income of the Palace is derived from the operation of the computer-aided pull-tab games. For example, during the twenty days of operation in April, 1992, the games accounted for net revenue to the Tribe of $107,307.45. Discontinuance of the games' operation is costing the Tribe over $5,300.00 per day in lost revenue from the games alone, excluding revenue

from other bingo activities and concessions, which the computer-aided pull-tab games help by attracting players. The Tribe's revenue from the bingo game and concessions, therefore, will also begin dropping in the near future.

16. The Palace cannot lose 80% of its revenues and continue to operate profitably. This loss of revenue threatens not only the viability of the Palace, but the Tribe as a political, social and economic entity in its entirety. In addition to jeopardizing the Tribe's investment in the Palace, the Commission's regulations have effectively interdicted the Tribe's major source of income, which the Tribe will never be able to recover. In turn, that threatens the Tribe's governmental and social programs for its people. Without those programs, many Tribe members will have to turn to the federal and state governments for assistance.

17. The Tribe has established a tremendous amount of goodwill in the South Alabama community by having a reputation for honesty and for running a crime-free and "clean" operation. Attempted prosecution of the Tribe or its members would severely and perhaps unalterably damage the Tribe's reputation and the goodwill it has established in operating the Creek Bingo Palace.

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FURTHER AFFIANT SAYETH NOT.

/s/
EDDIE L . TULLIS

Sworn and subscribed to before me
on this the 27th day of May ,
1992.

/s/
Notary Public

My Commission Expires: 11/93

Appendix E -1

DECLARATION OF MARK NICHOLS

MARK NICHOLS, being first duly sworn, declares and states as follows:

1. I am over the age of 18 and competent to make this declaration. The facts set forth herein are based on my own Personal knowledge.

2. I am the Chief Executive Officer of the Cabazon Band of Mission Indians. The Cabazon Band is a federally recognized Indian tribe which occupies the Cabazon Indian Reservation in Riverside County, California. As Chief Executive Officer of the tribe, I am responsible for the overall management and operation of all tribal activities and enterprises. I have served in this position since 1989.

3. The Cabazon Band first began operating video pull-tab devices on its reservation in March, 19 9 1., more than a year before the National Indian Gaming Commission issued its regulations in April, 1992. We have operated these devices continuously since March, 1991.

4. Gaming revenues account for approximately 94% of the Cabazon Band's total annual tribal revenue. Approximately 75% of this gambling revenue is directly derived from the video pull-tab games.

5. If the Cabazon Band was required to shut down the operation of these computerized pull-tab games while our case is appealed, the economic consequences for the tribe would be forced to take the following actions:

a. The tribally-funded child care center would be forced to close;

b. The tribal fire department would cease operations, leaving the reservation without structural fire protection services. Under the BIA-Riverside County fire protection agreement, the County only provides brush fire protection on the reservation;

c. The tribal Public Safety Department would be unable to provide law enforcement services in the remote portions of the reservation;

d. Current scholarship programs, providing educational opportunities for tribal members and their famines, would be discontinued;

e. Tribally-funded health insurance programs for tribal members (medical and dental) would have to be reduced to inadequate levels;

f. Maintenance of reservation lands, including the tribal cemetery, would be drastically curtailed;

g. Employee assistance programs, including alcohol and substance abuse programs, would have to be halted.

6. The Cabazon Band currently employs 308 people, 49% of which are Native Americans or other minorities. If the tribe cannot operate its video pull-tab games while our appeal goes forward, we will have to fire approximately 150 employees. Because of the condition of our local economy and because many of these individuals have limited job skills, most of them will be unable to find other jobs and will go back to public assistance or other welfare programs.

7. The Cabazon Band has made great strides in the last few years in our efforts to strengthen our tribal government and to become economically self-sufficient. The revenues from our video pull-tab machines have enabled us to begin these efforts. Without these revenues, most of our progress would end and we would go back to the skeleton of a tribal government without being able to offer the programs and services that our members and employees desperately need.

I declare under penalty of perjury that the foregoing statements are true and correct.

Dated this 6th day of July, 1993 at Indio, California.

/s/
Mark Nichols

Appendix F -1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CABAZON BAND OF MISSION INDIANS, ET AL.,	)	
Plaintiffs,	)	Civil Action No. 92-1103 (RCL)
NATIONAL INDIAN GAMING COMMISSION, et al.,	)	

AFFIDAVIT

I, Lowanda Abraham, being first duly sworn, hereby depose and state as follows:

1. I am Secretary of the Delaware Tribe of Western Oklahoma (hereinafter "Tribe") and have personal knowledge of the Tribe's income derived from its Class II gaming enterprise and of the general nature of expenditures of funds derived from that enterprise.

2. The Tribe operates an ordinary bingo game and also employs technologic aids (a combination of video screens and computers) in the play of pull tabs which are of the nature of those subject to this suit.

3. Approximately 42% of the income derived from tribal gaming operation derives from the operation of the pull tab games described above in paragraph number "2" and 58% is derived from the bingo games.

4. The Tribe employs 18 people in the gaming enterprise, some of whom would become unemployed if the

Tribe were forced to discontinue the pull tab game.

5. The Tribe expends revenue derived from the operation of the pull-tab game for critical services for the tribal members including assistance in such matters as health, education and emergency needs, all of which would be severely curtailed i not totally discontinued, if the Tribe were forced to discontinue the pull-tab game.

6. I swear under penalty of perjury that the foregoing is true and correct.

/s/
Lowanda Abraham
Tribal Secretary

SWORN TO before me this 7th day of JULY, 1993.

/s/
Notary Public

My commission expires: May 23, 1996

Appendix G -1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CABAZON BAND OF MISSION INDIANS, ET AL.,	)	
Plaintiffs,	)	Dkt. No. 92-1103 (Lamberth)
NATIONAL INDIAN GAMING COMMISSION, et al.,	)	

DECLARATION OF MARSHALL McKAY

I, MARSHALL McKAY, do declare and say:

1. I am an enrolled member of the Rumsey Indian Rancheria, a plaintiff in the above-captioned action, and the Tribe's elected secretary.

2. Since 1991, I have also served as a member of the Board of Directors of Cache Creek Indian Bingo & Casino (hereinafter the "gaming Enterprise", which is the wholly owned and operated Enterprise of the Rumsey Indian Rancheria.

3. Our gaming Enterprise operates Class II games, including bingo and paper pull-tabs, as well as the electronic pull-tab games, which are the subject matter of this lawsuit.

4. The electronic pull-tab games have been in place at our gaming Enterprise since 1991, prior to the

promulgation of Class II regulations by the National Indian Gaming Commission, which purport to classify these devices as Class III gaming.

5. The majority of revenues generated by our gaming Enterprise come from the electronic pull-tab devices identified above. Without these devices, it will be very difficult for our gaming Enterprise, which is the Tribe's only significant source of funds, to continue to be profitable.

6. Revenue from our gaming Enterprise provides our members with funds for health care, home improvement, and our children with funds for education. There is no other source of revenue to fund these programs. In addition, funds from our gaming Enterprise are used to employ all of the members of the Rancheria, either directly as employees at Cache Creek, or indirectly by providing wages for other types of employment by the Tribe on our Rancheria.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed this 7 day of July, 1993 in Sacramento, California.

/s/
MARSHALL McKAY

Appendix H -1

UNITED STATES COURT OF APPEALS
For The District Of Columbia

NO. 93-5255 September Term, 1993
92cv01103

Cabazon Band Mission Indians, et al.,

Civil Action No. 92-1103

Appellants,

(RCL)

v.

National Indian Gaming Commission, et al.

BEFORE: Wald, Williams and Henderson,*

ORDER

Upon consideration of the motion for injunction pending appeal, the responses thereto, and the reply, it is

ORDERED that the motion for injunction pending appeal be granted. Appellants have demonstrated satisfaction of the stringent standards required for an injunction pending appeal. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Circuit Handbook of Practice and Internal Procedures 38-39 (1987). Appellees are enjoined from interfering with appellants' continued use and operation

*Judge Henderson would deny the motion for injunction pending appeal.

of the games at issue in this case pending resolution of the appeal from the district court's order filed June 28, 1993. It is

FURTHER ORDERED, on the court's own motion, that this appeal be expedited. See 28 U.S.C. § 1657.

The Clerk is directed to schedule this case for oral argument and establish a briefing schedule.

Per Curiam

PNN07FDF